§1325(a)(5)(B)(ii) - interest on secured claim - 12/1
137262

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Savannah Division

In the matter of:

WILLIE LEE GADSON
IDA LUE GADSON

Debtors

Chapter 13 Case

Number 89-40986

MEMORANDUM AND ORDER
ON OBJECTION TO THE DEBTOR'S PLAN
FILED BY GENERAL MOTORS ACCEPTANCE CORPORATION

On November 15, 1989, a hearing was held on an objection by General Motors Acceptance Corporation ("GMAC") to the Debtors' plan. Specifically, GMAC objected to the Debtors' valuation of the motor vehicle and also to the interest rate to be provided over the life of the Debtors' plan. The valuation issue was resolved at that hearing and the interest issue was taken under advisement. Pursuant to Bankruptcy Rule 7052, and after the evidence adduced at trial and the testimony of the parties and reviewing applicable authorities, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The Debtor, Willie Lee Gadson, purchased a 1987 Chevrolet Sprint automobile in May of 1987. The sales contract provided for an annual interest rate of 15.9%. Debtor and his wife filed a joint petition under Chapter 13 of the Bankruptcy Code with this Court on June 21, 1989. On June 28, 1989, Debtors filed their Chapter 13 plan providing for payments of $50.00 weekly for 60 months and valuing the collateral of GMAC at $4,000.00. GMAC filed a proof of claim asserting the amount of the secured claim to be $8,050.30. Debtor and GMAC reached agreement and by mutual consent valued the vehicle at $4,500.00, thus giving GMAC a secured claim for $4,500.00 and an unsecured claim for $3,550.30 to be paid pro-rata from the remaining funds in an amount to be estimated at confirmation.

Rule 8 of the Bankruptcy Local Rules for the Southern District of Georgia, as adopted on October 26, 1989, states in relevant part:

> Unless otherwise ordered by the Bankruptcy Judge, the Chapter 13 Trustee is directed

> to pay interest at a rate of 12% per annum on all allowed secured claims and is further directed to file objections to or notify debtor's counsel with respect to any claim which is not filed in accordance with the terms of this order.

GMAC has presented evidence that its current rate for loans of this type is 14%. There was no evidence presented as to what the market rate was, beyond the evidence as to the rate charged by GMAC. The Chapter 13 Trustee has argued in support of the 12% rate which is established by local rule, in the absence of a specific court ordered rate.

CONCLUSIONS OF LAW

The sole remaining issue to be determined concerns the appropriate rate of interest to be paid on GMAC's claim in light of the Eleventh Circuit ruling in Matter of Southern States Motor Inns, Inc., 709 F.2d 647 (11th Cir. 1983), Bankruptcy Local Rule 8 and other applicable authorities. The issue before the Court in Southern States concerned the appropriate interest rate to be applied to arrearage payments of delinquent federal taxes under Section 1129(a)(9)(C) of the Code. The Bankruptcy Court had applied

the current interest rate provided for by 26 U.S.C. Section 6621 and reduced it by 1% for the "rehabilitation aspects" of the reorganization plan. The Eleventh Circuit Court of Appeals rejected this formula as an inadequate method for determining the interest rate which would pay the claimant the full present value of its claim in accordance with the mandate of Section 1129(a)(9)(C), holding that "the interest rate to be used in computing present value of a claim pursuant to Section 1129(a)(9)(C) shall be the current market rate without any reduction for the 'rehabilitation aspects' of the plan". Id. at 652-53.

While Section 1129(a)(9)(C) concerns claims of the kind specified in Section 507(a)(7) of the Bankruptcy Code, [allowed unsecured claims of governmental units], GMAC correctly pointed out that the Southern States court observed that the language "value, as of the effective date of the plan" provision of 11 U.S.C. Sections 1129(b)(2)(A)(i)(II), 1129(a)(9)(C), 1225(a)(5)(B)(ii) and 1325(a)(5)(B(ii), is virtually identical and has been similarly construed. As a result, I conclude that GMAC is entitled to recover the "market rate" prevailing for credit of this type. In re Corley, 83 B.R. 848 (Bankr. S.D.Ga. 1988). (Phrase "value, as of the effective date of the plan" in Bankruptcy Code Section pertaining

to deferred compensation to secured creditors, has the same meaning in Chapter 11, Chapter 12 and Chapter 13 proceedings).

The Eleventh Circuit recently readdressed the construction of "value, as of the effective date of the plan" in the Chapter 12 context in Travellers Ins. Co. v. Bullington, 878 F.2d 354, 357-58 (11th Cir. 1989). In Travellers, the debtor had proffered evidence in the form of a chart of the current interest rate returns to support their contention that the interest rate provided in the plan was within the range of market rates. The creditor proffered no objective evidence to show that the interest rate provided for in the plan would not equal or exceed the present value of its secured claim. Rather, the creditor merely put on a witness who stated that Travellers itself would not extend a mortgage over the given period and if it would, then it would provide for a higher rate of interest. The Eleventh Circuit held that "[v]alue must be determined objectively. Simply because a creditor subjectively would not extend a mortgage on the same terms does not . . . mean that objectively a mortgage does not have a given value." Id. at 358.

I construe the Travellers decision as supporting a finding that a creditor's evidence as to what its rate may be is

insufficient to prove what the prevailing market rate is. I therefore conclude that GMAC's objection should be overruled, inasmuch as it failed to prove that 14% is, objectively, the prevailing rate of interest in this locality at this time for similar loans. Since GMAC has failed to prove that it is entitled to recover interest at the 14% rate, the question remains whether it should recover any interest on its claim.

It is axiomatic that a Chapter 13 plan may modify the rights of holders of secured claims, except the rights of the holder of a claim secured only by an interest in real property which serves as the principal residence of the debtor. This includes modification of the contractual interest rate. 11 U.S.C. Section 1322(b)(2). The treatment of allowed secured claims under Chapter 13 is provided for in 11 U.S.C. Section 1325(a)(5). 5 Collier on Bankruptcy, §1325.06 at 1325-31 through 1325-32 provides:

> The Code's criteria for the treatment of secured claims are set forth in section 1325(a)(5). For that confirmation standard to be met, the plan must provide, with respect to each allowed secured claim provided for by the plan that (1) the holder of each allowed secured claim provided for by the plan accepts the plan; (2) the plan provides that the holder of any allowed secured claim provided for by the plan may

> retain the lien securing the claim, and unless the value, as of the effective date of the plan, of any property to be distributed under the plan on account of the claim is not less than the amount of such secured claim; or (3) the plan proposes that the debtor surrender to the holder of any allowed secured claim provided for by the plan the property securing the claim. (Emphasis omitted).

Unless the Chapter 13 debtor surrenders the property securing the lien to the holder of the allowed secured claim provided for in the plan or the holder accepts that plan, a Chapter 13 plan may not be assured of confirmation without a cramdown provision comporting with Section 1325(a)(5)(B)(i)(ii). Chapter 13 cramdown is comprised of two essential elements, (i) lien retention and (ii) equivalent value, each of which must be provided for under the Chapter 13 plan itself. 5 Collier on Bankruptcy, §1325.06 at 1325-35 (15th ed. 1989). Part "2(b)" of the Debtor's plan provides that "secured creditors shall retain the liens securing their claims. Creditors who file claims and whose claims are allowed as secured claims shall be paid the lesser of (1) the amount of their claim, or (2) the value of their collateral as set forth here: GMAC - $4,000.00: AVCO - $300.00." As stated before, the valuation of the GMAC claim was modified by mutual agreement to $4,500.00. Hence the first

essential element of a Chapter 13 cramdown, that the plan provide for retention of the lien, has been met.

The simplest method for equating the present value of deferred future payments with the amount of the allowed secured claim is to propose interest rates over and above the face amount of the allowed secured claim at whatever interest rate is equivalent to the rate selected by the court or agreed upon by the parties. 5 Collier on Bankruptcy §1325.06 at 1325-39 (15th ed. 1989) (emphasis provided). This Court could presumably order payment of the contract rate when there is an objection to confirmation, but no proof of the prevailing market rate, as here. On the other hand Collier suggests that the contract rate is not the proper rate. Although Collier argues that the proper rate is the lender's cost of funds and to that extent conflicts with binding precedent in this Circuit, which requires market rate to be paid, the rationale does support my conclusion that something less than the contract rate should be applied when proof of the prevailing rate is lacking. 5 Collier on Bankruptcy, §1325.06 at 1325-40, provides as follows:

> Through the payment of interest, the creditor is compensated for the delay in receiving the amount of the allowed secured claim, which would be received in full

immediately upon confirmation if the collateral were liquidated. Since the creditor is deprived of these funds to the extent they are deferred through the plan, the creditor must obtain them elsewhere, for whatever purposes they were to be used. In view of this purpose, the appropriate discount rate is one which approximates the creditor's cost of funds in its business borrowings. If the holder of an allowed secured claim receives interest which compensates it in full for any additional interest costs incurred due to the deferral of payment, it is not harmed by that deferral.

Thus, contrary to the holdings of a number of courts, it is rarely appropriate to select the rate charged to the debtor in the original transaction as the present value discount rate. Treating the chapter 13 deferral of payments like a new loan transaction, as those courts have done, provides the holder of the allowed secured claim with not only the cost of the funds it would lend but also the costs of a new loan transaction, which would not be incurred, and the profit that would be earned in that transaction. Neither of these latter two amounts would be received if the collateral were surrendered; the lender would have to incur new transaction costs to earn an additional profit. To include them in the present value discount rate would give the holder of an allowed secured claim more than the equivalent of immediate payment of that claim in full. Such a reading of the statute would also ignore the fact that, during the legislative process leading to the Bankruptcy Amendments and Federal Judgeship Act of 1984, Congress specifically considered an amendment requiring the contract rate of interest to be paid and rejected it. (Emphasis provided).

In the absence of affirmative proof of a prevailing market rate it is certainly possible to argue that the secured creditor has failed to carry its burden of proof and that no interest should be paid its secured claim. However, by local rule this Court has endeavored to insure a means of establishing that an appropriate rate of interest is paid on all secured claims, conserving the resources of the Court as well as litigants. With literally thousands of secured claims to adjudicate, it is obvious that a uniform method of calculating interest by the Trustee is highly desirable. The Local Rule administratively establishes such a method, for the protection of all secured creditors, subject to the Court's authority to judicially set a different rate when, as here, an objection is raised to that rate.

When, however, the objection fails by competent, affirmative evidence to establish the appropriate market rate, I have judicially concluded that 12% shall be the rate of interest to be paid on secured claims. This is the rate applicable to judgments in Georgia and fairly compensates the creditor for the loss of use of its funds. GMAC will receive the same monies, over the life of the plan as it would receive if it obtained a state court judgment against Debtor on the effective date of the plan in the same amount as the value of its collateral. O.C.G.A. Section 7-4-12. As a

matter of Federal Bankruptcy policy GMAC should obtain no more in this proceeding since 11 U.S.C. Section 1325(a)(4) makes no provision for interest on the unsecured portion of GMAC's claim.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that General Motors Acceptance Corporation is entitled to be paid interest at the rate of 12% on the $4,500.00 secured portion of its claim with the remaining $3,550.30 to be treated as unsecured.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia
This 26th day of February, 1990.